84-476 (1)

No. 84-——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT MCDONALD,

Petitioner,

v.

DAVID I. SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRUCE J. ENNIS, JR.
(Counsel of Record)
PAUL R. FRIEDMAN
ENNIS, FRIEDMAN, BERSOFF & EWING
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 775-8100

Of Counsel:
GEOFFREY P. MILLER

MCNEILL SMITH
H. MILES FOY, III
SMITH, MOORE, SMITH, SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

(2197)

QUESTIONS PRESENTED

1. Does the Petition Clause of the First Amendment provide an absolute defense to an action for libel, even if the plaintiff alleges knowing falsity, when:

a) the allegedly defamatory statements are contained in private letters from an individual citizen addressed solely to the President with copies to a few other federal officials; and

b) the statements concern the qualifications of a candidate voluntarily seeking presidential nomination and appointment to a high federal office?

2. In those circumstances, if the Petition Clause does not provide an absolute defense, does it at least require increased procedural protections, including judicial discretion to award costs and legal fees to an uninsured defendant if he ultimately prevails?

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Petitioner Robert McDonald respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 28, 1984.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. A at 1a-6a) is reported at 737 F.2d 427 (4th Cir. 1984). The opinion of the District Court for the Middle District of North Carolina (App. B at 7a-30a), is reported at 562 F. Supp. 829 (M.D.N.C. 1983).

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[1] The caption contains the names of all parties.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 28, 1984 (App. C at 31a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is an action by respondent David I. Smith, a disappointed candidate for federal office, who seeks a million dollars in damages because of allegedly libelous statements concerning his qualifications for that office. The statements were contained in two private letters from the petitioner, Robert McDonald, to President Reagan, with copies to only a few federal officials in the executive and legislative branches.[2]

The complaint alleges that respondent was actively seeking nomination and appointment as U.S. Attorney for the Middle District of North Carolina, and was a

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[2] Respondent does not allege that the statements were communicated to the public or the press. The complaint alleges that defendant sent these letters to "some of the highest governmental and political figures in the United States." There is no allegation that the letters were mailed to anyone other than the individuals specifically listed as receiving copies. The first letter, dated December 1, 1980, was addressed to President-elect Reagan and showed copies to Edwin Meese; Rep. Jack Kemp; Rep. W.E. Johnson; and Sen. Jesse Helms. The second letter, dated February 13, 1981, was addressed to President Reagan, and showed copies to Edwin Meese; Rep. Barry Goldwater, Jr.; Sen. Jesse Helms; and William Webster, Director of the Federal Bureau of Investigation.

serious contender before petitioner mailed the allegedly defamatory letters.

The complaint alleges that both letters contained defamatory statements which injured respondent's reputation and damaged his chances of appointment.[3] The complaint further alleges, although only in conclusory terms, that petitioner knew the statements were false at the time he made them and that he acted out of malice and spite towards respondent.[4]

The complaint was filed in state court in Alamance County, North Carolina. Petitioner removed the case to the United States District Court for the Middle District of North Carolina on grounds of diversity of citizenship, because he was a citizen of Virginia and respondent was a citizen of North Carolina.

Petitioner thereafter moved for judgment on the pleadings, on the ground that the allegedly defamatory statements were absolutely privileged by the Petition Clause of the First Amendment to the United States Constitution. Petitioner also argued that even if private communications from a citizen to his government are not absolutely privileged, defendants who are sued because of such communications should be entitled to special pro-

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[3] The letters stated petitioner's opinion that respondent lacked the character and technical competence to merit appointment. They discussed specific incidents in which respondent acted with "tremendous lack of regard . . . for the law, the civil rights of individuals, and our system of justice in general."

[4] Petitioner's answer to the complaint denied that the statements were false or that petitioner knew they were false. Indeed, the letters themselves provided a means for verifying the truth of most of the statements contained therein by documenting the instances described with names, addresses, and telephone numbers of persons present at the time, with citations to court records and newspaper articles, and with other evidence. Petitioner offered to appear at any hearing related to the selection process in order to testify under oath about respondent's character and qualifications.

cedural protections, including judicial discretion to award them costs and legal defense fees should they ultimately prevail.

On April 28, 1983, the District Court ruled against petitioner and filed a written opinion. 562 F. Supp. 829; App. 7a. The District Court agreed with petitioner that the First Amendment right to petition is applicable to the states and imposes limits on the state's power to vindicate reputation through its law of defamation, and also agreed that

> "decisions interpreting the 'speech' clause of the first amendment do not necessarily control cases concerning the 'petition' clause. For, as Chief Justice Marshall once stated, 'It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.'"

562 F. Supp. at 837; App. 17a.

The District Court nevertheless rejected petitioner's contention that the principles developed by this Court in the *Noerr-Pennington* line of cases[5] immunize legitimate petitioning activity from liability for defamation. The District Court interpreted those cases as holding only that Congress did not intend to regulate petitioning activity through the Sherman Act, and not as articulating any broader or more general rule of constitutional law. 562 F. Supp. at 838; App. 20a.

The District Court agreed with petitioner that his allegedly defamatory communications fell "within the general protection afforded by the petition clause" (562 F. Supp. at 838; App. 21a), but concluded that the Petition Clause does not provide an absolute privilege in libel

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[5] *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 126 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

cases. Instead, relying on this Court's 1845 decision in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), the District Court held that the privilege accorded under the Petition Clause is a qualified privilege only. 562 F. Supp. at 840; App. 23a.

The District Court acknowledged that its decision was contrary to that of the West Virginia Supreme Court in *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), but concluded that "the majority in *Webb v. Fury* has extended the scope of the *Noerr-Pennington* rationale far beyond its proper boundaries." 562 F. Supp. at 842; App. 28a.

Petitioner appealed to the Fourth Circuit, which affirmed. The Fourth Circuit, like the District Court, thought petitioner's claim to an absolute privilege was "governed" and barred by this Court's 1845 decision in *White v. Nicholls* (737 F.2d at 428; App. 3a), and thought that the absolute privilege recognized subsequently by this Court in the *Noerr-Pennington* trilogy provided a defense only in antitrust actions. 737 F.2d at 429; App. 5a-6a.

Neither the District Court nor the Fourth Circuit addressed petitioner's position that libel defendants who are sued because of *bona fide* petitioning activity should at least be entitled to increased procedural protections, including an opportunity to recover from the plaintiff the costs of their defense, should they ultimately prevail.

Although ruling against petitioner, the Fourth Circuit acknowledged that "the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question," and acknowledged a conflict between its decision and decisions of two state supreme courts and the Eighth Circuit. 737 F.2d at 428; App. 3a.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION IS IN DIRECT, ACKNOWLEDGED, AND UNSEEMLY CONFLICT WITH DECISIONS OF THE HIGHEST COURTS OF TWO STATES WITHIN THAT CIRCUIT AS TO WHETHER THE PETITION CLAUSE OF THE FIRST AMENDMENT PROVIDES AN ABSOLUTE OR ONLY A CONDITIONAL DEFENSE WHEN INDIVIDUAL CITIZENS ARE SUED FOR LIBEL BECAUSE OF THE INFORMATION THEY COMMUNICATE TO GOVERNMENTAL OFFICIALS.

A. The Conflict Is Direct And Acknowledged.

In rejecting petitioner's claim that his allegedly defamatory letters to the President were absolutely privileged under the Petition Clause, the Fourth Circuit acknowledged that "other courts have concluded that a petitioner is entitled to absolute privilege," citing the Maryland case of *Sherrard v. Hull*,[6] and the West Virginia case of *Webb v. Fury*.[7] 737 F.2d at 428 n.3; App. 3a n.3. See also 737 F.2d at 429; App. 5a.

The conflict between the Fourth Circuit and the highest courts in Maryland and West Virginia is direct and irreconcilable. All three cases were defamation actions based on communications from citizens to governmental officials. In each case the question presented was whether the defendants were entitled to an absolute privilege under the Petition Clause, or only to the conditional privi-

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[6] 460 A.2d 601 (Md. 1983), *affirming* 53 Md. App. 553, 456 A.2d 59 (1983). For some reason, the Fourth Circuit cited only to the lower court decision in *Sherrard*, even though it was aware that the Maryland Court of Appeals had unanimously affirmed the lower court decision and had adopted "the well-reasoned opinion" of the lower court. See 460 A.2d at 601.

[7] 282 S.E.2d 28 (W. Va. 1981).

lege it has been assumed they would have in any event under the Free Speech Clause.[8]

In order to avoid any chill on candid communications from citizens to their government, the courts in *Sherrard v. Hull* and *Webb v. Fury* recognized an absolute privilege for all communications that legitimately fall within the protection of the Petition Clause.

As the court observed in *Sherrard v. Hull*, 456 A.2d at 70-71:

> "The right of petition is a necessary element of our representative government, for it enables persons to inform the government of actual or perceived wrongs. It is to be distinguished from First Amendment freedoms, such as free speech, in defamation settings which generally involve communications made by one individual to another and are not directed at obtaining governmental action. It is the role of the government in this scenario which persuades us to hold the privilege to be absolute, indefeasible by malice."[9]

In *Webb v. Fury*, the court ruled that the "communications made by petitioner Webb to the federal agencies

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[8] This Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), that the conditional privilege provided by the Free Speech Clause does not apply if the communication was malicious in the constitutional sense, *i.e.*, knowingly false or uttered in reckless disregard of its truth. The District Court and Fourth Circuit decisions rest on the assumption that a public figure plaintiff will have to show constitutional malice in order to prevail even if, as here, the defendant is a non-media defendant. That question is presently before the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (see 52 U.S. Law Week 3011, 3148, 3369 and 3700).

[9] In Maryland, the absolute privilege recognized in *Sherrard* for petitions to legislative bodies has been held to be equally applicable to petitions to executive agencies. *Bass v. Rohr*, 471 A.2d 752, 757-758 (Md. Ct. Spec. App. 1984).

appear to be classic examples of absolutely privileged petitioning activity. . . . The people's right to petition the government for a redress of grievances is a clear constitutional right and the exercise of that right does not give rise to cause of action for damages." 282 S.E.2d at 37-39. The court concluded that unlike the conditional privilege provided by the Free Speech Clause, "the right to petition protects activity alleged to be malicious or knowingly false," because "permitting proof of malicious, fraudulent or deceitful intention to overcome the right to petition would so discourage the exercise of the right as to constitute an impermissible burden." 282 S.E.2d at 40.

The Fourth Circuit knew its decision could not be reconciled with *Sherrard v. Hull* or *Webb v. Fury*, and it made no effort to do so, noting only that it was "not persuaded by these authorities." 737 F.2d at 429; App. 5a. There is thus a direct and acknowledged conflict between the Fourth Circuit and the highest courts of Maryland and West Virginia as to whether the Petition Clause provides an absolute privilege in libel actions. This conflict is not between a recent case and an ancient case that would probably be decided differently in the light of intervening doctrinal developments. The cases were decided in 1984, 1983 and 1981, respectively, and are not likely to be reconsidered.

Accordingly, unless this Court resolves the conflict, the Petition Clause will provide an absolute defense in libel actions in Maryland and West Virginia state courts, but only a conditional privilege in the federal courts in those states.

B. The Direct Conflict Between The Fourth Circuit And The Highest Courts Of Maryland And West Virginia, Both Of Which Are Located Within The Fourth Circuit, Presents Additional Considerations Of Federalism Which Warrant Review In Order To Avoid Otherwise Inevitable And Unseemly Clashes Between State And Federal Courts.

This case presents the most intolerable type of conflict. Every direct conflict over the meaning of the federal constitution merits the attention of this Court, because the constitution should not mean different things in different jurisdictions. But when the conflict is between a federal circuit court and the highest courts of two states within that circuit, additional considerations of federalism and respect for state sovereignty compel review.

A federal district court forced to resolve that conflict would probably adopt the reasoning of the Fourth Circuit, whose judgments it is ordinarily bound to follow. But state courts are equally required, and entitled, to interpret and apply the federal constitution; a district court's deference to the Fourth Circuit's opinion would therefore be based solely on the premise that federal courts have greater wisdom, or at least authority, in interpreting the federal constitution than do state courts.

This conflict will encourage forum shopping that will add increasing burdens to the federal courts in Maryland and West Virginia, and will produce outcomes in federal diversity cases in those states that will be substantively different from the outcomes that would have resulted in the state courts. Given the existing conflict, libel plaintiffs in Maryland and West Virginia will certainly sue in federal court, rather than in their state courts, if they can allege diversity.

Denial of review in these circumstances would necessarily result in unseemly clashes between federal and state courts. Unless this Court resolves the conflict, a federal diversity court sitting in Maryland or West Vir-

ginia will necessarily have to reject the recent and considered judgment either of the highest court of the state in which it sits, or of the Fourth Circuit, in deciding whether the Petition Clause provides an absolute privilege or only a conditional privilege to libel defendants.

II. THE FOURTH CIRCUIT'S DECISION CREATES A CONFLICT BETWEEN DECISIONS OF THE EIGHTH AND SEVENTH CIRCUITS, ON THE ONE HAND, AND THE SIXTH AND FOURTH CIRCUITS, ON THE OTHER, AS TO WHETHER THE PETITION CLAUSE PROVIDES AN ABSOLUTE PRIVILEGE ONLY IN ANTITRUST ACTIONS, OR ALSO IN OTHER ACTIONS BASED ON THE CONTENT OF COMMUNICATIONS FROM CITIZENS TO GOVERNMENTAL OFFICIALS.

In the *Noerr-Pennington* triology of cases,[10] this Court made it clear that the Petition Clause provides not just a conditional defense but an absolute defense in antitrust actions based on *bona fide* petitioning activity.[11]

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[10] See note 5, *supra*.

[11] In *California Motor Transport*, this Court preserved an exception for "sham" petitions that bar the plaintiffs "from meaningful *access* to adjudicatory tribunals and so to usurp that decision making process." 404 U.S. at 512 (emphasis added). See also *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 103 S. Ct. 2161, 2168 (1983), suggesting that the sham exception could apply to baseless litigation that is "intended to restrain, or that has the likely effect of restraining, employees" from exercising their right to petition the National Labor Relations Board. Access-barring has been recognized as the "cornerstone to the sham exception." *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *cert. denied*, 439 U.S. 983 (1978). See also *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1082 (9th Cir. 1976) ("[I]n order to state a claim for relief under the *Trucking Unlimited* exception, a complaint must include allegations of the specific activities, not protected by *Noerr*, which plaintiffs

Recognizing that the existence of an absolute defense under the Petition Clause depends on the nature of the petitioning activity, not on the nature of the cause of action in which the defense is asserted, the Eighth and Seventh Circuits have held that the constitutional basis for the *Noerr-Pennington* doctrine is not limited to antitrust actions, but provides an absolute defense to other actions based on *bona fide* petitioning activity.

In *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980), the Eighth Circuit affirmed dismissal of a civil rights action, ruling that "the private citizens and their lawyers were absolutely privileged by the First Amendment to petition for the zoning amendment that caused plaintiffs' damages." 626 F.2d at 614. The Eighth Circuit said its "holding follows from principles recognized in" *Noerr-Pennington*, and noted that "lower federal courts have adopted this deference to the right to petition not only in antitrust cases but in other cases involving civil liability. In various contexts, these courts have held individual defendants constitutionally immune from liability for exercising their right to petition." 626 F.2d at 614-15.[12]

The Fourth Circuit acknowledged that its decision was in conflict with *Gorman Towers*. 737 F.2d at 428; n.3; App. 3a n.3.

In *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978), the Seventh Circuit ruled that the Petition Clause provides

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contend have *barred their access* to a governmental body.") (emphasis added), *cert. denied*, 430 U.S. 940 (1977).

The complaint in this case does not allege that petitioner's letters were a sham, and does not allege that those letters barred respondent from access to governmental officials.

[12] See also *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) (NOW's boycott of Missouri absolutely privileged under Petition Clause).

an absolute defense to a defendant sued under 42 U.S.C. § 1985(1) for sending complaints to an IRS agent's supervisor "with knowledge of their falsity." 547 F.2d at 1345. Acknowledging that *Noerr* was "not on all fours," the Seventh Circuit nevertheless cited *Noerr* as "a useful analogy" and ruled that a conditional defense was insufficient because "the prospect of a federal lawsuit resulting from any citizen complaint about the conduct of federal officials could chill the exercise of the right to petition." 547 F.2d at 1344, 1343. The Seventh Circuit noted that "it is easy enough to allege knowing falsity in a complaint . . .," thereby subjecting defendants to the likelihood of "full-blown litigation in which they must persuade a jury that their complaints, if not true, were at least based on enough facts as to avoid an inference of knowing or reckless falsity. This spectre alone could lead a citizen or taxpayer contemplating the lodging of a good faith complaint to reconsider." 547 F.2d at 1345.

In this case, the District Court and the Fourth Circuit adopted an extremely narrow interpretation of the applicability of the Petition Clause and the *Noerr-Pennington* doctrine, and effectively limited the absolute defense they provide to antitrust actions.[13]

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[13] The District Court, for example, expressly noted and rejected petitioner's argument "that *Noerr-Pennington* insulates any type of conduct that can be characterized as petitioning activity not only from the Sherman Act, but all other types of civil liability. . . . [T]he court determines that the defendant has misread the scope of the *Noerr-Pennington* rulings. In both cases, the Supreme Court was called upon to construe the congressional intent behind the Sherman Act in light of a possible conflict with the constitutionally protected right to petition the government. As this court interprets those rulings, it finds that the Supreme Court ruled only that Congress did not intend to regulate through the Sherman Act combinations to influence government decisionmakers by publicity campaigns, lobbying, or the use of the channels and procedures of state and federal agencies, even where the intentions and purposes of those involved in the combinations are anti-competitive and monopolistic. . . . [T]he court rejects McDonald's interpretation of the

The Fourth Circuit also cited and relied upon *Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1984). *Windsor*, in turn, expressly declined to follow *Stern v. United States Gypsum*, and held, contrary to the holding in *Stern*, "that the first amendment right to petition for redress of grievances does not protect from section 1985(1) liability those who conspire intentionally to defame a federal officer in order to effect that official's discharge. To the extent that *Stern* holds to the contrary, we decline to follow it."

Thus, there is a conflict between the Fourth and Sixth Circuits, on the one hand, and the Eighth and Seventh Circuits, on the other, as to whether the Petition Clause provides an absolute defense in actions other than antitrust actions.[14]

Noerr-Pennington decisions. . . ." 562 F. Supp. at 838 (footnotes omitted); App. 19a-21a.

The Fourth Circuit adopted an equally narrow interpretation of the Petition Clause and the *Noerr-Pennington* doctrine. See 737 F.2d at 429-30; App. 5a-6a.

[14] Numerous other state and federal courts have ruled that the Petition Clause establishes an absolute right to petition when the communications are between citizens and government. *E.g., Sierra Club v. Butz*, 349 F. Supp. 934, 936 (N.D. Cal. 1972) (Petition Clause provides absolute defense against common law tort liability for intentional interference with advantageous relationship and for fraudulent misrepresentation; complaints based on environmental group's administrative appeals and written and oral complaints to federal officials dismissed); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D.N.Y. 1979) (lobbying town officials and filing complaints absolutely privileged; complaints based on 42 U.S.C. §§ 1982, 1983 and 1985(3) dismissed); *City of Long Beach v. Bozek*, 31 Cal.3d 527, 183 Cal. Rptr. 86, 645 P.2d 137 (1982) (filing suit against government is absolutely privileged under Petition Clause, so governmental entities cannot sue for malicious prosecution).

III. THE FOURTH CIRCUIT ACKNOWLEDGED THAT THE NATURE OF THE PRIVILEGE PROVIDED BY THE PETITION CLAUSE PRESENTS A SERIOUS AND UNSETTLED QUESTION.

Although declining to grant petitioner an absolute defense or increased procedural protections, the Fourth Circuit nevertheless acknowledged that "the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question. . . ." 737 F.2d at 428; App. 3a.

A. Whether The Petition Clause Provides An Absolute Defense In Libel Actions Is A Question Of Nationwide And Recurring Importance, And Is Of Concern Not Only To Individual Libel Defendants, But Also To Congress And The Executive Branch.

Whether citizens can communicate candidly with federal officials concerning the qualifications of persons seeking federal office, without fear that they will have to defend a costly libel action if they do, is obviously a question of importance not only to individual citizens, but also to Congress and the Executive Branch.

In fact, the United States appeared as *amicus* in *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), and expressly urged that court to recognize an absolute defense, based on the Petition Clause, for citizens who are sued for libel because of their communications to federal agencies. The United States argued that a conditional defense would be inadequate because "the threat of a defamation suit will effectively chill the exercise of the right to petition. Unless the right to petition is privileged against suits such as DLM's, it will lose any real meaning because private citizens will be deterred by the threat of litigation from exercising the right." [15]

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[15] Reply Brief for the United States as *Amicus Curiae* in *Webb v. Fury*, *supra*, at 13. See also *id.* at 11 ("To allow a plaintiff to simply plead bad faith would create a chilling effect on the exercise of the right to petition."); Brief for the United States as *Amicus Curiae* in *Webb v. Fury*, *supra*, at 31, 34 ("A final con-

The deterrent is not just the prospect of having to pay substantial damages if a jury finds the defendant's statements to be libelous, but also the prospect of having to defend at all. Over two-thirds of all libel defendants are private citizens and non-media defendants,[16] most of whom, like petitioner, do not have insurance to cover the costs of a judgment, or of a defense. Even if such defendants ultimately prevail, they have to absorb, personally, the entire cost of their defense. It is common for prevailing defendants in libel actions to spend many thousands of dollars on attorneys' fees (lawyers frequently represent libel plaintiffs, but not defendants, on a contingency fee basis), and on deposition transcripts and related costs. That is a great deal for an individual citizen to spend for the privilege of communicating with his government.[17]

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stitutional protection afforded Webb, in addition to those discussed above, is the First Amendment right to petition the Government for a redress of grievances . . . . Persons who provide information to the federal government under these statutes [the Clean Water Act and the Surface Mining Act] should not be required to risk the possibility of a lawsuit and liability. The realization of the goals of these statutes requires an absolute privilege."

More recently, the House Joint Leadership has submitted a brief *amici curiae* urging recognition of an absolute privilege for communications from citizens to Congress. See Memorandum of the House Joint Leadership as *Amici Curiae*, dated June 14, 1982, submitted in *Webster v. Sun Company, Inc.*, (D.D.C. No. 81-2867). See also the Supplemental Memorandum of the House Joint Leadership as *Amici Curiae*, dated July 6, 1984, submitted in the same case.

[16] Between January 1976 and June 1979, approximately 70% of the defendants in all reported defamation cases were non-media defendants. Franklin, Marc A., "Winners And Losers And Why: A Study of Defamation Litigation," 1980 Am. Bar Foundation Research Journal 455, 497.

[17] This Court has frequently noted the deterrent impact of potentially expensive litigation, particularly when individuals do not have insurance or free counsel, and when (as in most cases alleg-

Thus, even in the rare case where the citizen can be relatively *certain* that his statements will ultimately be found to be true, he also knows that if he is sued he will have to pay thousands of dollars to defend against the conclusory allegation—easily made—that they are knowingly false.

B. Whether The Petition Clause Requires Increased Procedural Protections In Libel Actions Based On Bona Fide Petitioning Activity Is A Question Of Nationwide And Recurring Importance, And The Fourth Circuit's Refusal To Grant Increased Procedural Protections Is Inconsistent With Principles Established In Prior Decisions Of This Court.

This Court has consistently and repeatedly ruled that special procedures are required in cases governed by the Free Speech Clause of the First Amendment. *E.g., Bose Corporation v. Consumers Union*, 104 S. Ct. 1949 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Kunz v. New York*, 340 U.S. 290 (1951).[18]

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ing malice), complex factual issues are likely to preclude summary judgment. *E.g., Briscoe v. LaHue*, 103 S. Ct. 1108, 1120, and n.29 (1983), *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 103 S. Ct. 2161, 2169 (1983).

[18] These increased procedural protections include *de novo* appellate review of facts in free speech cases, and permitting a defendant, in the free speech context, to attack a statute on its face for overbreadth, even though it may have been perfectly constitutional as applied to that defendant. Indeed, the requirement that public figure plaintiffs allege and prove malice in libel cases is a special procedure "designed to preserve the robust exchange of ideas and

The rights protected by the Petition Clause are even more central to our representative form of government than are the rights protected by the Free Speech Clause, and they should be accorded even greater procedural protections.

Historically, the right of petition is much older than, and quite distinct from, the right of speech. The right of petition can be traced at least to the 13th Century. The Magna Carta, or "Great Charter of Liberties," resulted from a petition feudal barons presented to King John in 1215;[19] and the right to petition almost certainly existed even before Magna Carta.[20] In contrast, the

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information which is essential to our way of life." *Webb v. Fury*, 282 S.E.2d at 47 (Neely, J., dissenting). In *Webb*, the dissent would have granted even greater procedural protections than requested here, and would have provided that a prevailing "defendant be awarded the full costs of his defense as a matter of course without exception." *Id.*

[19] See W. McKechnie, *Magna Carta* 38 (1914). See also O. Holt, *The Making of Magna Carta* (1965); A. Pallister, *Magna Carta—The Heritage of Liberty* (1971); *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. 1031 (1973); W. Stubbs, *The Constitutional History of England* 413 (J. Cornford ed. 1979) (tracing right to petition to the articles of the barons in 1215 and other precedents from 1258, 1301, 1309, and 1310).

The compromise achieved by the Magna Carta prevented a rebellion by the barons and the overthrow of King John. The right to petition in our Constitution plays a similar function by placing authorities on notice regarding the people's grievances so that those grievances can be corrected quickly and peacefully.

[20] One commentator states that "[t]he right of every subject to petition the sovereign *had always existed*." A. White, *The Making of the English Constitution* (2d ed. 1925) (emphasis added). According to another authority, "[t]he right of petitioning the crown and parliament was one of the most valuable possessed by the subject, and seems to have been exercised from the earliest times." F. Plucknett, *Taswell-Langmead's English Constitutional History* 669 (11th ed. 1960). The earliest recorded petition may have been in 1013, when London fell to the Danes and Aethelred

general right of speech did not develop until at least four hundred years later. See generally L. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* 88-125 (1960).

Although the rights of speech and petition are closely related, they are not identical. All petition is speech, but not all speech is petition. Petition is a narrow and preferred form of speech.

The distinctions between the rights of petition and speech reflect the differences in their underlying purposes. The right of speech furthers the autonomy of individuals by permitting them to express their own ideas; it ensures that government will be subject to public scrutiny and criticism; and it advances the quest for truth by subjecting competing voices to a free marketplace of ideas. See generally L. Tribe, *American Constitutional Law* § 12-1, at 577-79 (1978).

The right to petition, on the other hand, is specifically framed to ensure that channels of communication between citizens and their government remain unimpeded. The government, by receiving petitions, obtains necessary information regarding individual problems, broad political and social concerns, and potential or actual violations of law. Only if the channels for petitioning remain open will government be informed and remain responsive to the needs of its citizens. It was "the role of the govern-

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II (also known as "the Unready") fled to France. The English leaders, according to the *Anglo-Saxon Chronicle*, sent him a Remonstrance listing grievances and summoning Aethelred to appear before the witan. He sent his son Edward with a written message that he "would remedy each one of the things which they all abhorred, and everything should be forgiven that had been done or said against him, on condition that they all unanimously and without treachery return to their allegiance." This brief message, responding to a petition for redress of grievances, may be the first recorded document of liberty in English history. Marsh, *Documents of Liberty* 13-14 (1971).

ment" in the right of petition which distinguished that right from the right of speech for the court in *Sherrard v. Hull*, and which "persuade[d] [the court] to hold the privilege to be absolute, indefeasible by malice." 456 A.2d at 71.

The right to petition is thus of immense value to government, and is even more central than the right of free speech to our representative form of government. Indeed, the right to petition has been held to be one of the few privileges and immunities of national citizenship.[21] It is the means by which citizens make their needs and wishes known to government. It provides citizens a mechanism for obtaining redress of grievances, and for expressing deeply-held beliefs regarding public issues. If this extraordinarily fundamental interest of both citizen and government in maintaining open and uninhibited channels of communication does not require an absolute privilege for *bona fide* petitioning activity, as petitioner contends, it at least requires increased procedural protections to minimize the number of citizens who will be deterred by the threat of litigation from communicating with their elected representatives.

IV. BECAUSE THE FOURTH CIRCUIT ERRED IN CONCLUDING THAT THIS CASE IS GOVERNED BY THIS COURT'S 1845 DECISION IN *WHITE v. NICHOLLS*, THIS COURT SHOULD, AT THE LEAST, SUMMARILY REVERSE OR VACATE AND REMAND TO ENABLE THE FOURTH CIRCUIT TO RECONSIDER.

Curiously, although acknowledging that the nature of the privilege provided by the Petition Clause presents an "unsettled" question, the Fourth Circuit nevertheless concluded that this case is "governed" by *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845). 737 F.2d at 428; App. 3a.

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[21] See *In re Quarles*, 158 U.S. 532 (1895); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876).

White obviously does not "govern" this case. *White* was not a constitutional case at all. The defendants did not claim a constitutional privilege, whether absolute or conditional, and this Court did not purport to interpret or apply the Constitution. *White* was simply a common law case arising in the District of Columbia, and the Court did no more than analyze the common law existing at that time.[22]

White was decided well before the First Amendment, including the Petition Clause, was held to apply to state action at all. Furthermore, *White* was decided in an era in which the First Amendment was not thought to provide *any* privilege against defamation liability, whether conditional or absolute. Until this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), libelous speech was considered to be simply unprotected by the First Amendment. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Like "fighting words," obscenity, and commercial advertising, defamatory speech was considered to be wholly "outside the scope of the freedom of speech. . . ." See *Bose Corporation v. Consumers Union*, 104 S. Ct. 1949, 1961 (1984). That the *White* Court did not recognize or even discuss an absolute constitutional privilege for defamatory speech was entirely consistent with the jurisprudence of the time, which did not authorize even a conditional constitutional privilege. See *Sherrard v. Hull*, 456 A.2d at 68. For all these reasons, *White* clearly does not "govern" in the present era, now that defamatory speech *is* entitled to constitutional protecton.

If the Fourth Circuit had not believed it was "governed" by *White*, it might have reached a different con-

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[22] Indeed, in *Briscoe v. LaHue*, 103 S. Ct. 1108, 1114 n.12 (1983), a majority of this Court expressed the opinion that "*White v. Nicholls* was not even a reliable statement of the common law," and concluded that "*White v. Nicholls* cannot be considered authoritative."

clusion. Accordingly, because *White* clearly does not govern, and because the Fourth Circuit's belief that it does is inconsistent with *New York Times Co. v. Sullivan*, *Noerr-Pennington*, and with doctrinal developments in this Court over the past 139 years, the Court should at least reverse summarily on that ground or vacate and remand for further consideration.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should summarily reverse or vacate and remand for further consideration.

Respectfully submitted,

BRUCE J. ENNIS, JR.
(Counsel of Record)
PAUL R. FRIEDMAN
ENNIS, FRIEDMAN, BERSOFF & EWING
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 775-8100

Of Counsel:
GEOFFREY P. MILLER

MCNEILL SMITH
H. MILES FOY, III
SMITH, MOORE, SMITH, SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450
Counsel for Petitioner

Dated: September 25, 1984